IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

HARRIS COUNTY, TEXAS,	§	
	§	
Plaintiff,	§	
	§	
VS.	§	CIVIL ACTION NO. H-13-2371
	§	
WASTE MANAGEMENT, INC. *et al.*,	§	
	§	
Defendants.	§	

MEMORANDUM AND OPINION

This case arises out of the effects on the San Jacinto River of a former hazardous dump site located in Harris County, Texas. In December 2011, Harris County sued the former site owners, operators, and users, as well as their successors: McGinnes Industrial Maintenance Corporation; Waste Management, Inc.; Waste Management of Texas; International Paper Company; and Champion International Corporation. Harris County alleged multiple violations of Texas state law from the discharge of dioxin and other hazardous wastes into the San Jacinto River from 1967 through 2008. The defendants removed from state court in August 2013, within 30 days after deposing a witness designated to represent Harris County. (Docket Entry No. 1).

Harris County now moves to remand on the basis that because it alleged only state-law claims and sought only state-law civil penalties, this court lacks subject-matter jurisdiction. (Docket Entry No. 36, at 1). International Paper responds that deposition testimony from the Harris County representative revealed that the claims include a challenge to the Environmental Protection Agency's ("EPA") action to clean up and remediate the dump site under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. § 9601 *et seq.* (Docket Entry

No. 53). According to International Paper, because Harris County is challenging the EPA's CERCLA cleanup, there is federal-question jurisdiction under 28 U.S.C. § 1331 and exclusive federal jurisdiction under § 113(b) of CERCLA, 42 U.S.C. § 9613(b). International Paper argues that despite Harris County's attempt to limit the claims to those arising under state law, the suit necessarily raises federal claims.

Based on a review of the pleadings, the motion to remand and response, the parties' submissions, and the applicable law, this court grants Harris County's motion to remand, (Docket Entry No. 36). The reasons for this decision are set out below.[1]

I. Background

In the 1960s and 1970s, Champion International Corporation, which was later acquired by International Paper, disposed of paper-mill waste at a site on the banks of, and "jutting into," the San Jacinto River. (Docket Entry No. 1, Ex. C-1 at 4). The site was built and operated by McGinnes Industrial Maintenance Corp., later acquired by Waste Management, Inc. and Waste Management of Texas, Inc. (*Id.* at 4). The paper-mill waste that Champion dumped allegedly contained dioxin, a highly toxic and carcinogenic substance. (*Id.*, Ex. C-1 at 4).

The dump site was made up of a series of earthen pits. A combination of hurricanes, floods, groundwater pumping, and river dredging caused the pits to fail. (Docket Entry No. 53, at 2). Harris County asserted that dioxin was released from September 1967 through April 2008. (Docket Entry No. 1, Ex. C-1 at 4–5). In 2008, the EPA placed the site on the CERCLA National Priorities List for remediation. (Docket Entry No. 53, at 2). The EPA identified McGinnes and International

[1] The request for oral argument is denied. It is neither necessary nor practical given the timing of the removal in relation to the state-court trial setting and the need to rule on the remand motion promptly. The motion for an extension of time, (Docket Entry No. 56), is moot.

Paper as "potentially responsible parties" for the cleanup costs. (*Id.*). The EPA later issued an administrative order requiring International Paper and McGinnes to work with the agency to prepare a remedial investigation and feasibility study for the site. International and McGinnes completed the investigation and submitted a draft feasibility study identifying different remediation options. At this point, the EPA has not decided on a remediation plan. (*See* Docket Entry No. 53, at 2–3).

In December 2011, Harris County sued the defendants in Texas state court, asserting violations under the Texas Water Code, the Texas Spill Act, and the Texas Solid Waste Disposal Act. (Docket Entry No. 1, Ex. C-1). Harris County sought civil penalties for statutory violations that occurred between 1967 and April 2008. Harris County's lawsuit alleged only state-law violations and sought only state-law civil penalties. Harris County did not seek relief under CERCLA or any other federal statute. Indeed, Harris County expressly stated in its petition that "[t]his state-court lawsuit seeks monetary relief under state law and does not seek or challenge any cleanup, removal or remedial action dictated by federal law, and does not assert any federal law claims." (*Id.*, Ex. C-16 at ¶ 73).

In July 2013, International Paper served a deposition notice on Harris County under Texas Rule of Civil Procedure 199.2(b)(1).[2] (Docket Entry No. 36, Ex. A). International Paper sought discovery on 72 topics. Waste Management also served a deposition notice on Harris County,

[2] Texas Rule of Civil Procedure 199.2(b)(1) is the Texas-state analogue to Federal Rule of Procedure 30(b). The rule provides in relevant part:

> If an organization is named as the witness, the notice must describe with reasonable particularity the matters on which examination is requested. In response, the organization named in the notice must—a reasonable time before the deposition—designate one or more individuals to testify on its behalf and set forth, for each individual designated, the matters on which the individual will testify. Each individual designated must testify as to matters that are known or reasonably available to the organization.

seeking discovery on 30 topics. Harris County designated Larry Soward as one of the individuals to testify as its organizational representative under Rule 199.2(b)(1). Before each deposition, Harris County designated the topics on which Soward would testify. (*Id.*, Ex. C). In response to International Paper's notice, Harris County designated Soward to address specific factual allegations that Champion or International Paper dumped dioxin and other hazardous waste. (*Id.*). Harris County also designated Soward to explain Harris County's statutory basis for suing. (*Id.*). In response to Waste Management's notice, Harris County designated Soward to testify about postclosure site requirements, calculation of civil penalties, and the statutory authorization for filing suit. Harris County did not designate Soward to testify about the CERCLA cleanup. Nor did Harris County designate Soward to testify about what it intended to do with any civil penalties it might recover.

International Paper deposed Soward on July 17, 2013. In the deposition, Soward testified that "there had not been sufficient satisfactory enforcement and remediation of the matters associated with the site." (Docket Entry No. 1, Ex. A at 54). In response to a question asking whether Harris County's lawsuit was necessary for remediation, Soward stated that the civil penalties sought were needed to "get total and complete remediation of the pollution that has occurred and is occurring at the site." (*Id.* at 55). He also testified that the lawsuit might force International Paper and McGinnes to "clean up the site as it needs to be cleaned up and to address the pollution in the San Jacinto River." (*Id.*). Harris County's counsel objected to these questions as outside the topics on which Soward was designated to speak as Harris County's representative. (*Id.*).

International Paper removed on the basis that Soward's deposition testimony revealed that Harris County's state-court lawsuit was an attempt to challenge the EPA's CERCLA cleanup of the

site, making the lawsuit a "controversy arising under CERCLA" with exclusive federal-court jurisdiction. (*See* Docket Entry No. 1, at 2 (citing 42 U.S.C. § 9613)). International Paper also asserted that Harris County's state-law claims necessarily raised a substantial, disputed federal issue—whether this court must dismiss Harris County's lawsuit as an impermissible challenge to a preremediation CERCLA action. (*See id.* (citing *Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308 (2005))).

Five days after International Paper removed, Harris County moved to remand, pointing out that the removal occurred shortly before the state court's trial setting. (Docket Entry No. 36). The Texas Commission on Environmental Quality ("TCEQ"), an indispensable party under Texas Water Code § 7.353, filed a brief supporting the motion to remand. (Docket Entry No. 49). International Paper responded to the motion to remand, (Docket Entry No. 53), Harris County replied, (Docket Entry No. 58), and TCEQ filed a reply in support of remand, (Docket Entry No. 60).

The arguments and record are examined under the applicable law.

II. Analysis

A. The Legal Standard for Removal

A defendant has the right to remove a case to federal court when federal jurisdiction exists and the removal procedure is properly followed. *See Manguno v. Prudential Prop. and Cas. Ins. Co.*, 276 F.3d 720, 723 (5th Cir. 2002) (citing 28 U.S.C. § 1441). To determine whether there is federal-question jurisdiction, the claims in the state-court petition are considered as they existed at the time of removal. *Id.* The removing party bears the burden of establishing that a state-court suit is removable to federal court. *Id.* (citing *De Aguilar v. Boeing Co.*, 47 F.3d 1404, 1408 (5th Cir 1995). If a case is improperly removed, the federal court must remand the action to state court. 28

U.S.C. § 1447(c). Doubts about the propriety of removal are to be resolved in favor of remand. *See In re Hot–Hed Inc.*, 477 F.3d 320, 323 (5th Cir. 2007) (per curiam).

B. Removal on the Basis of Soward's Deposition Testimony

Under 28 U.S.C. § 1446(b)(3), if the original pleading presents no ground for removal, a defendant may remove to federal court within 30 days after receiving "an amended pleading, motion, order or *other paper* from which it may first be ascertained that the case is one which is or has become removable." (emphasis added). Under Fifth Circuit law, a transcript of a deposition is an "other paper" under § 1446(b). *Delaney v. Viking Freight, Inc.*, 41 F. Supp. 2d. 672, 677 (E.D. Tex. 1999) (citing *S.W.S. Erectors Inc. v. Infax Inc.*, 72 F.3d 489, 494 (5th Cir. 1996)). The first issue is whether Soward's deposition testimony is an "other paper" that makes this case removable.

The parties dispute whether Soward was speaking as Harris County's designated representative when he testified in his deposition that the remediation efforts at the dump site had been insufficient. Harris County contends that the deposition excerpts International Paper cites are outside the issues on which Soward was designated to testify, and therefore this court should not attribute those statements to Harris County. (Docket Entry No. 36, at 9). International Paper responds that a corporation is bound by the testimony of its designated representative, even if that testimony is outside the topics specified in the deposition notice or witness designation. (Docket Entry No. 53, at 9).

The court need not resolve this issue, other than to note that International Paper's position appears somewhat overstated. *See* 8A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, *Federal Practice and Procedure* § 2103 (3d ed. 2013) ("It might be argued . . . that . . . the corporation's answers in a Rule 30(b)(6) deposition are 'binding' on it . . . . But as with any other party statement,

they are not 'binding' in the sense that the corporate party is forbidden to call the same or another witness to offer different testimony at trial."). As discussed below, Soward's deposition testimony does not establish a basis for federal-question jurisdiction.

The well-pleaded complaint generally determines whether a case is removable. *See Eggert v. Britton*, 223 F. App'x 394, 397 (5th Cir. 2007); *see also Hoskins v. Bekins Van Lines*, 343 F.3d 769, 772 (5th Cir. 2003) ("Under the well-pleaded complaint rule, federal jurisdiction exists only when a federal question is presented on the face of plaintiff's properly pleaded complaint." (internal quotation marks omitted)). Under limited circumstances, an "other paper" may establish federal-question jurisdiction by clarifying the federal basis of the asserted claims. *Eggert*, 223 F. App'x at 397–98. For example, in a state-law breach-of-contract case between an employee and her employer over retirement benefits, the "other paper" could show that the retirement benefits were governed by ERISA, preempting the breach-of-contract claim and creating federal-question removal jurisdiction. *See Peters v. Lincoln Elec. Co.*, 285 F.3d 456, 468–69 (6th Cir. 2002). Or a deposition transcript may be used to clarify that the amount-in-controversy requirement for diversity jurisdiction is met. *Eggert*, 223 F. App'x at 397. But the "other paper" may not raise a new claim that has not been pleaded. *See id.* at 397–98; *see also Trotter v. Steadman Motors, Inc.*, 47 F. Supp. 2d 791, 792 (S.D. Miss. 1999) (holding that "deposition testimony that does not tend merely to clarify the federal nature of an existing claim but which relates to a putative claim *which has not been pled*, is not 'other paper' from which it may be ascertained that the case is or has become removable.") (emphasis in original).

In this case, Harris County pleaded in clear and unambiguous language that it was suing the defendants only on state-law claims. The petition explicitly stated that "[t]his state-court lawsuit

seeks monetary relief under state law only. It does not seek or challenge any cleanup, removal or remedial action dictated by federal law, and it does not assert any federal law claims." (Docket Entry No. 1, Ex. C–16 at ¶ 73). Soward's deposition testimony does not "clarify" the federal nature of the existing state-law claim. Soward's testimony is not an "other paper" that can create a CERCLA claim.

B. The Pleading does not Challenge a CERCLA Action or Necessarily Raise a Substantial Disputed Federal Issue under CERCLA.

Even assuming that Soward's testimony is an "other paper" that this court may consider, International Paper has not shown that Harris County's state-court lawsuit challenged a CERCLA cleanup or necessarily raised a substantial disputed federal issue that triggered exclusive federal jurisdiction.

Relying on Soward's deposition testimony, International Paper asserts that removal is proper by invoking § 113(b) of CERCLA, the exclusive-jurisdiction provision, 42 U.S.C. § 9613(h). Section 113(b) states, "United States district courts shall have exclusive jurisdiction over all controversies arising under this chapter without regard to the citizenship of the parties or the amount in controversy." 42 U.S.C. § 9613(b). Analogizing to 28 U.S.C. § 1331 (federal-question jurisdiction) and the well-pleaded complaint rule, Harris County responds that CERCLA's exclusive-jurisdiction provision "is limited to claims that on their face allege a CERCLA cause of action." (Docket Entry No. 36, at 18-19 & n.88). According to Harris County, because the face of the state-court petition stated no CERCLA claim—and eschewed such a claim—CERCLA's exclusive-jurisdiction provision does not apply.

As International Paper correctly notes, many courts examining CERCLA's jurisdiction provision have concluded that § 113(b) is not limited to claims that expressly refer to or specifically arise under CERCLA. Courts have interpreted § 113(b)'s jurisdictional grant to "cover any 'challenge' to a CERCLA cleanup." *Se. Tex Envtl., L.L.C. v. BP Amoco Chem. Co.*, 329 F. Supp. 2d 853, 870 (S.D. Tex. 2004) (quoting *Fort Ord Toxics Project, Inc. v. Cal. Prot. Agency*, 189 F.3d 828, 832 (9th Cir. 1999) (internal quotation marks omitted)).[3] As other courts have noted, Congress's decision to grant exclusive federal jurisdiction over "all controversies arising under" CERCLA is broader and "more expansive than would be necessary if it intended to limit exclusive jurisdiction solely to those claims created by CERCLA." *Fort Ord. Toxics Project, Inc.*, 189 F.3d at 832 (quoting *Bolin v. Cessna Aircraft Co.*, 759 F. Supp. 692, 715 (D. Kan. 1991) (internal quotation marks omitted)). The Fifth Circuit has not directly addressed this issue. But assuming that this circuit would follow the courts concluding that § 113(b) applies beyond claims that challenge a CERCLA cleanup without expressly referring to CERCLA, International Paper has not demonstrated that, considering Soward's testimony, Harris County's state-law lawsuit challenges a CERCLA cleanup.

To answer the question of what constitutes a "challenge" to a CERCLA cleanup, both parties refer to the Ninth Circuit's decision in *ARCO Environmental Remediation, L.L.C. v. Department of Environmental Quality of Montana*, 213 F.3d 1108 (9th Cir. 2000). In *ARCO*, a party potentially responsible for contamination at a Superfund site sued the state environmental agency in state court,

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[3] *See also Coffey v. Freeport-McMoRan Copper & Gold Inc.*, 623 F. Supp. 2d 1257, 1271 (W.D. Okla. 2009), *aff'd sub nom.*, *Coffey v. Freeport McMoran Copper & Gold*, 581 F.3d 1240 (10th Cir. 2009) (agreeing with the "Ninth Circuit's conclusion that a district court has jurisdiction over state law claims that challenge a CERCLA cleanup because they implicate significant federal issues"); *Bolin v. Cessna Aircraft Co.*, 759 F. Supp. 692, 715 (D. Kan. 1991).

under state law, seeking access to records concerning the CERCLA cleanup at the site. *Id.* at 1113. The defendant removed, arguing that the claim arose under CERCLA. *Id.* The defendant's removal theory was that the plaintiff wanted the records to get information that would reduce the scope of the CERCLA cleanup and generally disrupt the cleanup process. The Ninth Circuit stated that a lawsuit challenges a CERCLA cleanup only "if it is related to the goals of the cleanup." *Id.* at 1115 (internal quotation marks omitted). Specifically, a CERCLA cleanup is challenged when "the plaintiff seeks to dictate specific remedial actions, to postpone the cleanup, to impose additional reporting requirements on the cleanup, or to terminate the [Remedial Investigation/Feasibility Study] and alter the method and order of cleanup." *Id.* (internal quotation marks and citations omitted).

Harris County's petition seeking civil penalties under Texas law does not affect the CERCLA cleanup in any of the ways the Ninth Circuit mentioned in *Arco*. The petition does not seek injunctive relief that could alter the method and order of whatever cleanup or remediation plan emerges. Nor could the resolution of the claims result in conflicting obligations for the defendants. Soward's testimony that Harris County was unhappy with the EPA's efforts—which had not yet progressed to identifying a remediation plan—did not assert a challenge to a CERCLA action. Whatever the outcome of the state-court claims, the EPA's CERCLA cleanup will be unaffected. Harris County's state-court lawsuit does not "challenge" the CERCLA cleanup. The lawsuit is not a controversy under § 113(b)'s jurisdictional provision.

International Paper cites two cases from this circuit to support its claim that Harris County's state-court lawsuit is a challenge to a CERCLA cleanup, *Voluntary Purchasing Group, Inc. v. Reilly*, 889 F.2d 1381 (5th Cir. 1989) and *Georgoulis v. Allied Products Corp.*, 796 F. Supp. 986 (N.D. Tex. 1991). Both cases involved a potentially responsible party seeking a declaratory judgment that it was

not responsible for the costs associated with a CERCLA cleanup. Neither case asked the court to consider whether the state-court lawsuit was a challenge to a CERCLA cleanup. Nor did the cases address the criteria for determining whether a state-court lawsuit is a challenge to a CERCLA cleanup.

In *Reilly*, a plaintiff sued the EPA in federal court, seeking a declaratory judgment that it was not liable for costs incurred for the "EPA's response actions in connection with a site cleaned up by the EPA." 889 F.2d at 1381. The court found that the plaintiff's lawsuit arose under CERCLA and was precluded by its prohibition on "pre-enforcement" review of remedial actions. *Id.* at 1389 (referring to 42 U.S.C. § 9613(h)). The court held that "until the government initiates a cost recovery action, a potentially responsible party cannot obtain judicial review of the agency action." *Id.*

In *Georgoulis*, corporations brought a declaratory judgment action against a private party seeking a declaration that they were not liable for costs associated with the CERCLA cleanup of a hazardous waste dump site. 796 F. Supp. at 987. The court held that the claim was within CERCLA's exclusive jurisdiction and that the bar on preremediation review applied. The court reasoned that "if [potentially responsible parties] were allowed to file suits for declaratory judgment, prior to cost recovery suits being filed by the EPA, much of the agency's time and resources would end up being allocated to litigation in this area." *Id.* at 988–89. The court explained that allowing potentially responsible parties to sue each other before a CERCLA cleanup would discourage parties from entering into settlements with the EPA "for fear of being sued by [potentially responsible parties] in declaratory judgment actions"; lead to piecemeal lawsuits frustrating the speedy cleanup of hazardous wastes; and "lay the basis for inconsistent adjudications of liability." *Id.* at 989–90.

Reilly and *Georgoulis* are not on point. Unlike the plaintiffs in *Reilly* and *Georgoulis*, Harris County is not a potentially responsible party facing liability for cleaning up a site. The concerns the courts raised in *Reilly* and *Georgoulis* about potentially responsible parties suing each other rather than agreeing to participate in a CERCLA cleanup, and the potential for inconsistent liability adjudications, are not present here.

International Paper alternatively argues that if this court concludes that Harris County's claims do not challenge the CERCLA cleanup and are not "controversies arising under CERCLA," there is still federal-question jurisdiction on the basis that Harris County's state-law claims necessarily present a substantial and actually disputed federal issue. (Docket Entry No. 53, at 19). There is a "special and small category" of cases in which federal-question jurisdiction exists even though the complaint alleges only state-law claims. *See Empire Healthchoice Assur., Inc. v. McVeigh*, 547 U.S. 677, 699 (2006). Allowing federal courts to decide substantial federal disputes that are necessarily raised in state-law claims "captures the commonsense notion that a federal court ought to be able to hear claims recognized under state law that nonetheless turn on substantial questions of federal law, and thus justify resort to the experience, solicitude, and hope of uniformity that a federal forum offers on federal issues." *Grable & Sons Metal Products, Inc. v. Darue Eng'g. & Mfg.*, 545 U.S. 308, 312 (2005). "[F]ederal jurisdiction over a state law claim will lie if a federal issue is (1) necessarily raised, (2) actually disputed, (3) substantial, and (4) capable of resolution in federal court without disrupting the federal-state balance approved by Congress." *Gunn v. Minton*, 133 S. Ct. 1059, 1065 (2013). The Supreme Court created this four-factor test in *Grable* "to bring some order to t[he] unruly doctrine" governing when federal-question jurisdiction can be asserted over state-law claims raising federal issues. *Id.*

International Paper frames the federal issue raised in Harris County's state-law claims as "whether the County has, in fact, challenged a CERCLA cleanup and, if so, whether that challenge is premature." (Docket Entry No. 53, at 19). By resolving the motion to remand, this court has already decided this issue and found no federal issue present, much less one that is necessarily raised. The initial question of whether a federal issue is present in this case does not form the federal question that provides federal removal jurisdiction. On remand, the state court will apply only state law. This case does not fall within the small category of cases warranting federal-question jurisdiction under *Grable*.

IV. Conclusion

Harris County's motion for remand, (Docket Entry No. 36), is granted. This case is remanded to the 295th Judicial District of Harris County, Texas.

SIGNED on October 11, 2013, at Houston, Texas.

Lee H. Rosenthal
United States District Judge